

From: Curt.Fransen@deq.idaho.gov <Curt.Fransen@deq.idaho.gov>
Sent: Monday, August 11, 2014 2:57 PM
To: TASreinterpretation
Subject: CWA TAS

Fred,

I appreciate the discussion this morning with the WSWC. I have some concerns or requests that I would appreciate some feedback from EPA's perspective. I realize these are legal questions at some point and I can ask for analyses from our AG office, but I would appreciate your input. Please forgive the informality of these comments/questions; they are off the top of my head and not carefully formulated or articulated.

1. My general understanding of Indian jurisdiction is consistent with comments this morning on the phone to the effect that Congress can delegate authority to tribes (and, if so, the Montana test is not germane). EPA is revisiting whether or not Congress expressly delegated in the CWA and EPA appears like change its interpretation from "no" to "yes". Here is my concern: where Congress has expressly delegated authority to tribes, it is my understanding that states are essentially preempted from asserting/exercising that same or similar authority. At least that is my understanding of how we approach, for example, air issues as a result of the CAA delegation to tribes (and default EPA to the extent the tribes don't have TAS). So, for example if, if there is a complaint about open burning within a reservation in Idaho, we (Idaho DEQ) do not respond even where the activity is by a non-member on fee land. As a result, in many instance, no one responds—at least not in any timely manner. Turning to WQ issues, if there indeed was an express delegation under the CWA, in the instance where a Tribe does not have TAS (no WQS, no NPDES, no ground water programs and not even any general requirements regarding water quality), I am concerned that my agency will be preempted from taking any action or otherwise responding to WQ issues. We currently do apply state requirements to non-members activity on fee lands. If there is an express delegation, we may no longer be able to do so. In instances where the Tribe and EPA have no capacity or ability to respond or take action, there will essentially be no action taken. So my question is whether it is EPA's understanding that an express delegation would effectively preempt states from asserting jurisdiction over non-member activities to protect surface or ground water on fee lands within a reservation. Similarly, would city/county jurisdiction regarding matters related to WQ (such as local ordinances based on police power where the local authority is not preempted by some state program—in other words where there is no express or "field" preemption). We have entire municipalities within reservations in Idaho (on fee lands). If a non-member dumps raw sewage on private fee land within a reservation, will the state or local government continue to have authority to enforce requirements prohibiting such activity?
2. Is it EPA's position that its reinterpretation of congressional intent in Section 518 of the CWA is entitled to Chevron deference?
3. Is EPA considering changing its interpretation regarding TAS requirements in other federal environmental statutes such as the SDWA? The issue I raised above regarding preemption would be of particular concern regarding drinking water issues. Idaho currently exercises authority (under state law—not through federal authorization) over dozens of non-member drinking water systems within reservations in Idaho that are located on fee lands. If the state was preempted, these systems would essentially be unregulated unless the Tribes or EPA could/would step into the breach.

Thanks for considering my concerns. I appreciate EPA's interest in trying to clarify and simplify the current jurisdictional ambiguities regarding environmental statutes it is charged with overseeing, but I am also very concerned that there might be unintended consequences on the ground if states and local governments were to be preempted from applying their own requirements as to non-member activities on fee lands within reservations.

Curt Fransen

Curt Fransen, Director
Idaho Department of Environmental Quality
1410 North Hilton
Boise, ID 83706
208-373-0240 (Tel)
208-373-0417 (Fax)
curt.fransen@deq.idaho.gov